Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of:	)	
	)	
Development of Competition and	)	MM Docket No. 92-265
Diversity in Video Programming	)	
Distribution and Carriage	)	

COMMENTS
OF THE
UNITED STATES TELEPHONE ASSOCIATION

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Summary

These comments explain that the Congress has specifically found facts about the cable industry, and expects the satellite and related programming distribution bottleneck to be eliminated. The Commission must take the affirmative protective steps the Congress expected, and cannot nullify the statute in its regulations.

The Commission, among other things, cannot presume lawful "exclusive" and other contracts that the statute concludes are to be unlawful. The Commission must collect or otherwise compile information about exclusive and other contracts implicated by these sections of the 1992 statute. It should eliminate distribution discrimination with effective standards that take into account antitrust concepts and a tougher standard than section 202 of the Communications Act. Grandfathered contracts should not be allowed to perpetuate unwanted leverage, and these contracts should be affirmatively evaluated to determine their unreasonableness. Addressing discrimination includes price, but also other aspects of these agreements.

The Commission should not institutionalize complaint procedures that unreasonably restrict the ability of complainants to develop the facts.

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COMMENTS OF THE UNITED STATES TELEPHONE ASSOCIATION

The United States Telephone Association (USTA) respectfully submits these comments on the Notice of Proposed Rulemaking (NPRM) in this proceeding, released December 24, 1992. In the NPRM, the Commission asks a number of questions dealing with new section 628 and section 616 of the Communications Act, involving program access and carriage, enacted as part of the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act).

I. THE CONGRESS INTENDED TO REMOVE A BOTTLENECK TO COMPETITIVE ENTRY, AND REACHED CONCLUSIONS THAT THE COMMISSION CANNOT NULLIFY OR DENY.

In the 1992 legislation, Congress found that "most cable television subscribers have no opportunity to select between competing cable systems." 1992 Cable Act at § 2(a)(2). It found that "without the presence of another multichannel video programming distributor, a cable system faces no local competition." Id. It concluded that "The result is undue market power for the cable operator as compared to that of consumers and video programmers." Id. Congress also found that "the cable industry has become a dominant nationwide video medium." 1992 Cable Act at § 2(a)(3).

Section 628 by its terms is intended to increase competition and diversity in the multichannel video programming market, increase the availability of satellite programming and spur the development of communications technologies. 47 U.S.C. § 628(a). The NPRM correctly observes that "Section 628 is intended to foster the development of competition to traditional cable systems by prescribing regulations that govern the access by competing multichannel systems to cable programming services."[1] In § 628(a)(2), Congress recognized that there could be no competition without new competitors. In the two succeeding subsections, §§ 628(b) and 2(c), Congress specified particular measures needed to be taken by the Commission in pursuit of that objective. The Commission is not at liberty to give these specifics less than full and literal implementation.

The primary operative provision of § 628 is subsection (b), which makes unlawful "unfair methods of competition <u>or</u> unfair <u>or</u> deceptive acts or practices" if the purpose or the effect "is to hinder significantly <u>or</u> to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or

[1]NPRM at ¶ 1.

consumers" (emphasis added.)[2] These sections require Commission action.

II. THE 1992 CABLE ACT WAS INTENDED TO ENSURE ACCESS IN ALL IDENTIFIED SITUATIONS BY REQUIRING THE COMMISSION TO TAKE AFFIRMATIVE PROTECTIVE STEPS.

The Commission is directed by Congress in § 628 (c) to prescribe regulations that, at minimum, establish effective safeguards to prevent the leverage by a cable operator of identified programming in which it has an interest against competitors, prohibit discrimination by identified programming interests affiliated with a cable operator against other competitors, prohibit "practices, understandings, arrangements and activities, including exclusive contracts" that prevent competitors from gaining access to identified programming for distribution in areas where it would otherwise not be made available, and prohibit other exclusive contracts for certain programming unless the Commission finds that a specific contract is in the public interest. § 628(c)(2)(A) to (D).

Generally, new section 628 does far less than most non-cable participants in the Commission's various recent cable proceedings recognize is necessary to make the cable market competitive.

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2 The NPRM describes the test differently - as involving harm to competition rather than harm to any distributor. NPRM at ¶¶ 10-11. It also suggests that the language could be read to be limiting - applying only to discriminatory conduct. Both of these would substantially change the test as set out by the plain language of the statute. The Commission should adhere to the statutory language.

However, it does more than the Commission acknowledges. See NPRM at ¶ 8. It covers more than "discrimination," and can have impacts beyond vertically integrated cable firms. The Commission's overall reading of the 1992 Cable Act here (and in other proceedings) is unusually restrained, and the result may be an unlawful administrative nullification of Congress' intent and the governing law. The 1992 Cable Act requires a more aggressive approach to deal with leverage of programming.

In few areas is Congress' concern more apparent than here. Having found that there is extensive concentration and vertical integration in the cable industry, Congress also found that the vertically integrated cable operators have both the "incentive and ability to favor their affiliated programmers." 1992 Cable Act at § 2(a)(5). It also found that most subscribers have no opportunity to select between competing cable systems. Id. at § 2(a)(2). Congress accepted the diversification of cable operators with networks into programming, but sought to control the favoritism and leverage that these enterprises exert against competitors. Most close observers of the cable business recognize that access to programming is a crucial component of any policy that is intended to bring competition to the cable television marketplace. It is a requirement for the competitive viability of other multichannel video programming distributors (MCVPDs). Non-cable MCVPDs cannot succeed in this business if they are subject to discrimination in program availability that operates to favor incumbent cable operators.[3]

III. THE COMMISSION SHOULD ELIMINATE INCENTIVES TO ENTER OR MAINTAIN LONG TERM CONTRACTS AND SHOULD MAKE FINDINGS CONCERNING THE REASONABLENESS OF ALL SPECIFICALLY-"GRANDFATHERED" CONTRACTS.

The Congress expected the Commission to assure that contracts that do not precisely meet its grandfathering conditions are not used to exclude or limit competition. It also anticipates that they not be rewritten to do the same thing. The threshold date is June 1, 1990. 47 U.S.C. 628 (h)(1)

The rules should reflect Congressional intent. A Commission election not to adopt rules or to enforce the statute again reflects administrative nullification of the governing statute. See NPRM at ¶ 27.

By the express terms of the statute, any amendment, revision or change in implementation of a contract should remove the grandfathering and require that the parties come into compliance

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[3] At note 13, the Commission asks a question about the definition of the term "multichannel video programming distributor." As set out in filings in MM Docket No. 92-259, USTA believes video dialtone (or channel service) providers are not MCVPDs, unless they gain relief from the current statutory gain and offer multiple channels of programming of their own. A customer on such a carrier's network is not a MCVPD unless it meets the statutory definition and offers multiple channels of programming. (Likewise, a user of a cable operator's leased access channels cannot be a MCVPD at least unless a customer can subscribe to multiple channels of video programming from it and a consumer can subscribe to those channels directly without independently having to pay the cable operator.)

with the general rule - that access be widely available on the reasonably similar terms and conditions that eliminate favoritism.

One step the Commission should take in this regard is to require all such contracts be identified and placed on the public record. Any contract that is so identified should be subject to individual evaluation by the Commission. It also should be subject to a petition by an interested person that the contract be found unreasonable and made subject to a Commission finding that its term or other provisions are in fact unreasonable. The Commission should enforce any such finding.

IV. IMPLEMENTING CONGRESSIONAL INTENT SHOULD BE THE PRIMARY OBJECTIVE OF THE COMMISSION IN ADDRESSING OTHER SPECIFIC ASPECTS OF THE NPRM.

The Commission asks a number of questions about implementation that must be driven by Congress' concerns. USTA submits that resolution of these specific issues are reflected in Congress' findings.

Taking Sections 2(a) and 628 of the 1992 Cable Act together, it is clear that Congress intended to foster entry of new MCVPDs into competition with the traditional cable operators by making strategic video programming available to new MCVPDs, and eliminating the ability of programming entities affiliated with cable operators to leverage their programming. Specifically, Congress intended for the Commission's regulations to relax the stranglehold of the traditional cable operators on satellite programming.

Availability of programming requires more than the regulatory override of exclusivity embodied in subsections (c)(3)(C) and (D), and (c)(4) of Section 628. To realize the Congressional purpose of introducing effective competition to traditional cable operators from other competing MCVPDs, programming must be available to such competitors on comparable terms and conditions. The Commission's regulations need not, and should not, regulate the <u>level</u> of the pricing among competitors, but the regulations should assure that the relative price levels and other terms and conditions contribute to a level playing field.

(A) <u>§ 628: "Unfair Methods of Competition, or Unfair or Deceptive Acts or Practices"</u>. Note 32 of the NPRM seeks comment as to whether Congress intended that the Commission regulate any additional unfair methods of competition or unfair or deceptive acts or practices beyond those specified in § 628(c). The statutory scheme and the laws of statutory construction strongly indicate that the inclusion of these terms was non-exclusive and is intended to provide wide latitude to the Commission. It is not intended to be limited to specific examples. To the extent this language has been included in other statutes, notably

Section 5 of the Federal Trade Commission's operative statute,[4] it confers extensive (albeit not unlimited) authority. It should be read to encompass those practices that are contrary to the antitrust laws, but should not be so limited.

(B) § 628(c)(2)(B): Discrimination in Programming Distribution. The Commission proposes to address the requirements of the 1992 Cable Act through the enforcement process. NPRM at ¶ 16. It correctly reads § 628(c)(2) to require that it must prohibit a programming vendor affiliated with a cable operator (and other identified entities) from discriminating in the prices, terms and conditions of sale or deliver of satellite programming, regardless of whether it involves cable systems, other MCVPDs, or agents or buying groups. Id.

However, the concept of "discrimination" is not easily susceptible to a specific definition or exhaustive description. While the Commission may seek to implement an objective standard, it should not cut off any option that the statute makes available to it. Flexibility is necessary in applying the statutory test to allow the Commission to respond to the wide variety of practices and situations that characterize the programming distribution marketplace. It also will prevent the possibility of restructuring to evade the literal language of any specific

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4 15 U.S.C. § 45(a). See also 19 U.S.C. § 1337(a) governing international trade.

prohibitions. The terms of § 623(h) of the Cable Act are not adequate to address these evasions.

Addressing discrimination may involve aspects of each of the options identified by the Commission in ¶¶ 20-23, particularly the first three options. Of the options, a variation of the section 202 test may be the most appropriate, because it offers the flexibility that is necessary at this point. Application of a "section 202-like" standard would encompass options 1 and 3. Under option 1, the Commission would endorse and institutionalize some pricing range by which contracts with affiliates can differ from contracts with others. This is not justifiable. It will promote a "safe harbor" in which many programming interests affiliated with cable operators will inevitably charge their affiliated cable operators lower prices, and those prices will tend to differ from competitors' prices by exactly the amount that reflects the permissible differential. The Commission has previously rejected such affiliate transaction differentials in other contexts. <u>See</u> Separation of Costs, 2 FCC Rcd 1298 (1987), recon. 2 FCC Rcd 6283 (1987). Endorsing such a price differential for monopoly cable operators identified as such by Congress would arbitrary and capricious. <u>No</u> price differential should be presumed valid; rather, the converse should be true - any price differential should be justified.

The Commission should require the vendors of satellite programming to offer all MCVPDs the same satellite programming at rates and discounts comparable to those at which such programming is offered to competing cable systems. This was the self-implementing comparability approach the Commission took elsewhere in "establishing and maintaining a fair and equitable climate" for competition, when the Commission perceived that newcomers faced vertically integrated suppliers with market power over certain critical production inputs. See Amendment of Part 21, 12 FCC 2d 841, 846, 850 (1968) (Guardband decision), recon. denied, 14 FCC 2d 269 (1968). The Second Circuit relied on these "equal-dealing" requirements in upholding the Commission's decision to license wireline carriers to provide mobile services in competition with the radio common carriers.[5] There, the court noted that the Commission's conditions on the wirelines were "designed to obviate any advantages that may accrue and equalize the competitive situation."

To the extent that unavailability of programming is a deterrent or obstacle to new MCVPDs, classical bottleneck concepts apply. The Supreme Court applied bottleneck theory in affirming a decree against a vertically integrated private electric company that had used its existing "strategic dominance in the transmission of power" to suppress incipient municipal competitors. Otter Tail Power Co. v. U.S., 410 U.S. 366, 377 (1973). The court approved a decree against the incumbent, preventing it from refusing to sell power at wholesale to competing municipal power systems or refusing to "wheel" power

[5] Radio Relay Corp. v. FCC, 409 F.2d 322, 327 (1969).

generated by others. Taken together, the various bottleneck cases support Commission rules precluding incumbent cable operators from exploiting through affiliated video programming suppliers their "strategic dominance"[6] in satellite programming.

A section 202-like standard also can encompass option 3. The Robinson-Patman Act, 15 U.S.C. 13(a), exists to eliminate non-cost discounts, and was enacted to eliminate anticompetitive discounting at the wholesale level for affiliated businesses at the retail level that were not generally available. That is what Congress sought in part to eliminate here.

In the distribution of satellite programming there is more to the matter of discrimination in programming availability than the price alone, which is covered above. Under § 202, differing prices for the same or functionally equivalent programming would automatically raise a question of reasonableness under section 202, and certainly should do so here. MCI v. FCC, 842 F.2d 1296 (D.C. Cir. 1988). The burden must shift to the provider at that point to justify the differential. ABC v. FCC, 663 F.2d 133, 139 (D.C. Cir. 1980).

There are aspects of the inquiry here, however, that should cause that burden to be somewhat different, and heavier. Under Title II, the comparisons are not complex and the services already are fully described in tariffs on file at the Commission.

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[6] Otter Tail, supra, at 377.

Here, in contrast, discriminatory effects can be achieved through small non-price differences as well as through price disparities, and the Commission has <u>no</u> opportunity to review the relevant terms at all, much less in advance, until someone complains. This requires vigilance, then, to assure that the statute will be complied with.

The mere presence of other programming, for example, cannot be expected to operate to minimize the risk of discrimination here as it would in the Title II context, where pure transport options exist. A recognized programming distribution option may not be able to be duplicated.

To the extent the Commission seeks to assure the nondiscriminatory access to programming that Congress intended, it must be even more tenacious here than it is under Title II. It must actively seek the information necessary to assure that programming contracts have a neutral and rational basis unrelated to the cable operator's Congressionally-recognized incentive to favor itself, and it must assure that improper ends are not be achieved, directly or indirectly.

(C) <u>§ 628(c)(2)(C) and (C)(2)(D): Exclusive Contracts and Other Practices</u>. As a preliminary note, the Congress did not limit its corrective mandate to exclusive contracts alone. The Commission's directive is to prohibit all practices covered by § 628(b) and 628(c)(2)(C). Equal access to programming and elimination of discrimination and leverage come into play with exclusive contracts, but also exist with other practices - sometimes with more pernicious effects.

A recurring problem with exclusive contracts will be the ability of the Commission to provide effective and timely relief. The Commission indicates at ¶ 33 that it does not believe it would be practical to require prior approval of exclusive arrangements. USTA respectfully disagrees. Most exclusive contracts are either flatly unlawful or presumptively unlawful under the statute. The language of the statute indicates that exclusive contracts under § 628(c)(2)(c) are unlawful, and exclusive contracts under § 628(c)(2)(4) are presumptively unlawful.[7] Thus, these contracts should be banned in regulations, and other, presumptively unlawful contracts should be banned unless an affected distributor shows that the contracts should be found lawful.

The only means available to complete the necessary review of any contract that would be within § 628(c)(2)(D) (or § 628(c)(4)) is for the Commission to require that it be filed with it prior to its effectiveness, go on public notice, and be open for comment. The Commission should then rely on the record to evaluate the agreement.

Some type of disclosure structure <u>must</u> be set up to do what

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[7] <u>Reference</u> NPRM at ¶¶ 28 and 30.

Congress intended. USTA opposes reliance only on the complaint process to deal with contracts that are affirmatively prohibited subject to justification. NPRM at ¶¶ 33-34.

(D) § 628: Enforcement. The Commission should provide for disclosure of relevant contracts and contract terms.[8] If the Commission maintains only a complaint procedure to enforce the statute and its rules, it should not adopt procedures that effectively discourage even complaints from being prosecuted in good faith. Absent early disclosure, the rules should require full disclosure in the course of prosecuting the complaint.

Specific allegations of misconduct and detailed explanation of a violation may be unable to be provided absent opportunities for disclosure and discovery. Again, unlike Title II, where most information is published or easily available, these cases will often turn on actions, letters or commitments that will tend to be well-concealed. Thus, USTA disagrees with the restrictive concept of enforcement that appears in ¶¶ 40-43 of the NPRM. Those suggestions will lead to the unjustified dismissal or loss of bona fide complaints. Further, the Commission should expand the range of available discovery tentatively set out in ¶¶ 46-48, for the same reasons.

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[8] It should also provide for affirmative statements that there are no other undisclosed terms. Cf. NPRM at note 56.

(E) § 616(a)(3): Program Carriage Discrimination. Similar concerns arise here as with § 628. The same analysis - establishing a presumption of discrimination where there is disparate treatment, and using a tougher standard than that set out in § 202 of the Communications Act - is appropriate.

V. CONCLUSION.

The Commission is requested to do what Congress intended, and to read and implement the statute so as to further competition to monopoly cable operators and provide the consumer with the protections that were expected in passing the statute. Congress intended that commercially critical distribution avenues be available equally to MCVPDs, and that strategic leverage not be available to benefit related cable operators.

Respectfully submitted,

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